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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PAMELA ENGLISH, Plaintiff, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY et al., Defendants and Respondents, GANZ & GORSLINE, Objector and Appellant.	B189270 (Los Angeles County Super. Ct. No. BC 327699)

APPEAL from an order of the Superior Court of Los Angeles County, Ralph W. Dau, Judge. Affirmed in part; reversed in part.

Law Offices of Edward A. Hoffman and Edward A. Hoffman for Objector and Appellant.

Raymond G. Fortner, Jr., County Counsel, Nedra Jenkins, Deputy County Counsel, for Defendants and Respondents.

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May a trial court impose discovery sanctions against counsel who has substituted out of a case and who received no notice sanctions were being sought against it? Ganz & Gorsline (Ganz), a law partnership, appeals from the trial court's order of January 9, 2006, imposing monetary sanctions on Ganz and its client.[1] Ganz contends the trial court's discovery rulings were incorrect and the motions in question should have been decided in its client's favor as a matter of law, removing any justification for awarding sanctions. We agree with Ganz in part, though not on this basis.

We hold the trial court abused its discretion in ordering sanctions against Ganz with respect to discovery motions submitted on January 6, 2006, because imposition of such sanctions violates the Civil Discovery Act (Code of Civ. Proc., § 2016.010 et seq.),[2] as well as state and federal guarantees of due process of law; the court's sanctions award of $2,500 against Ganz must therefore be reversed. As to discovery motions submitted on November 30, 2005, Ganz had appropriate notice and an opportunity to be heard and failed to show the court abused its discretion; therefore, the sanctions award of $1,200 against Ganz is affirmed.

FACTS AND PROCEDURAL HISTORY

Ganz filed this action in January 2005 on behalf of its client against respondents Los Angeles County Metropolitan Transportation Authority (MTA) and two of its employees (sometimes also collectively MTA). Ganz represented the plaintiff in this action from the time the case was filed until Ganz substituted out as counsel on December 5, 2005.

Plaintiff alleged she commenced employment with MTA as a bus driver in April 2003. During plaintiff's MTA employment and continuing through and after

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1 The monetary sanctions order is appealable by Ganz since it no longer represents, and has an interest separate from, its client. (*Barton v. Ahmanson Developments, Inc.* (1993) 17 Cal.App.4th 1358, 1361; see also *Bauguess v. Paine* (1978) 22 Cal.3d 626, 634, fn. 3.)

2 All further statutory references are to the Code of Civil Procedure.

February 2004, MTA allegedly subjected her to sexual harassment, discrimination and retaliation in violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.). Plaintiff's claims centered primarily on a single incident that occurred in January 2004 when she was on a training van ride learning new bus routes. During that van ride, one of the individual respondents allegedly subjected plaintiff to unwelcome vulgar and sexually suggestive comments and gestures. After plaintiff complained about the conduct, MTA allegedly retaliated against her and suspended her from work. As a result, plaintiff alleged she suffered a loss of wages, emotional distress and other damages.

MTA answered the complaint in April 2005, and a trial was set for March 2006.

The January 9, 2006 sanctions order from which Ganz appeals stems from five discovery motions related to MTA's attempts to investigate plaintiff's claimed injuries and damages. The discovery motions were heard by the court in two groups: The first two motions were heard by the court and submitted on November 30, 2005, and the remaining three motions were heard and submitted on January 6, 2006.

The first two motions were brought by MTA. Specifically, in September 2005, MTA moved to compel plaintiff to further respond to special interrogatories inquiring whether plaintiff had taken medical leave from any employer during the last 10 years and, if so, the reason for the leave. MTA asked the court to award monetary sanctions of $1,000 against "plaintiff and/or her attorneys" for MTA's having to bring the motion to compel. At the same time, MTA brought a second motion, for permission to take discovery pursuant to section 2017.220, subdivision (a).[3] MTA asked leave to take discovery concerning plaintiff's prior history of depression and her reasons for taking any medical leaves from prior employers. MTA informed the court Ganz had produced

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[3] Section 2017.220, subdivision (a) requires, in any civil action alleging sexual harassment, that a party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator establish specific facts showing good cause and relevancy by a noticed motion before taking the discovery.

redacted medical records from plaintiff's treating doctor indicating plaintiff had been hospitalized for preexisting mental illness. Plaintiff had refused to provide further discovery, claiming any inquiry into her prior medical history would invade her "unrelated and private sexual, medical or psychiatric history" in violation of former section 2017, the predecessor statute to section 2017.220. (Boldface and italics omitted.) MTA requested sanctions of $1,000 against "plaintiff and/or her attorneys," for attorney fees incurred in bringing the section 2017.220 motion.

Both of these motions were served on Ganz and argued at a hearing on November 30, 2005, at which plaintiff was represented by Ganz. The court provided the parties and counsel with a tentative ruling prior to the hearing. The tentative ruling indicated the court was inclined to allow the requested discovery and impose sanctions upon Ganz and plaintiff. Ganz argued against the tentative ruling and asked the court "at the very least" to remove the sanctions. After hearing counsel's arguments, the court took the motions under submission.

The remaining three motions were brought by Ganz on plaintiff's behalf and were heard and submitted on January 6, 2006.

The first of plaintiff's motions sought to quash deposition subpoenas served by MTA upon six healthcare providers that plaintiff had identified in discovery responses as having treated her for the personal injuries and emotional distress resulting from MTA's conduct. Plaintiff also sought to quash other deposition document subpoenas seeking production of her Social Security Administration records and her medical records relating to a preexisting condition, Parkinson's disease, that plaintiff had disclosed during a recent deposition.[4] Plaintiff also asked the court for a protective order against the discovery and

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4 In October 2005, plaintiff testified that she suffered from Parkinson's disease that prevented her from working from 1999 to 2002. She disclosed she received social security disability benefits before, during and after her MTA employment due to her Parkinson's disease. Further, she conceded that, while on medical leave from MTA as a result of her allegations in this litigation, she had asked for her social security disability insurance benefits to be reinstated because of her Parkinson's disease.

sanctions against MTA. In the second motion, plaintiff sought to compel MTA to provide a further response to a special interrogatory asking for the home addresses and telephone numbers of five nonparty MTA employees who purportedly were disciplined in nonrelated incidents about the same time as plaintiff. MTA had provided information regarding the employees but objected to disclosing their home addresses and telephone numbers citing the employees' constitutional right of privacy. In the third motion, plaintiff sought to compel MTA to further respond to a request for production of documents, even though MTA claimed it had already provided the documents to Ganz.

After filing the three discovery motions on plaintiff's behalf, Ganz substituted out as counsel for plaintiff. MTA was served with a copy of the substitution of counsel on December 5, 2005.

Several weeks after Ganz substituted out as counsel, MTA filed oppositions to plaintiff's three motions. In its oppositions, MTA requested sanctions against plaintiff and Ganz in the total amount of $5,000. Although MTA served plaintiff with copies of its oppositions and requests for sanctions, it failed to serve these documents upon Ganz. When the three motions were heard, on January 6, 2006, plaintiff was present to argue, but Ganz was not. The court took the matters under submission at the end of the hearing.

On January 9, 2006, the court issued a formal order regarding the five discovery motions it previously took under submission.

As to the two motions submitted on November 30, 2005, the court directed plaintiff to provide further responses to the special interrogatories and ruled MTA was entitled to obtain information concerning plaintiff's medical leaves during the previous five years. The court ordered plaintiff and Ganz to pay MTA sanctions of $600 for each motion, a total of $1,200.

As to the three motions taken under submission on January 6, 2006, the court ruled as follows. The court denied plaintiff's motion to quash (except for an out-of-state deposition that MTA had indicated it would not pursue), denied plaintiff a protective order and awarded MTA sanctions of $1,500 against Ganz and plaintiff. The court denied plaintiff's motion to compel a further response to her special interrogatory and awarded MTA sanctions of $500 against Ganz and plaintiff. The court further denied plaintiff's motion to compel MTA to produce documents and awarded MTA sanctions of $500 against Ganz and plaintiff. Thus, on the matters heard on January 6, 2006, the court awarded MTA attorney fees and costs in the total amount of $2,500 against Ganz and its client.

The clerk subsequently served the parties and Ganz with notice of entry of the court's order, and Ganz timely appealed.[5]

DISCUSSION

A trial court's imposition of discovery sanctions is reviewed for abuse of discretion. (*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496.) The court's exercise of discretion will be reversed only for manifest abuse exceeding the bounds of reason. (*Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988.) However, we apply the substantial evidence standard of review to the trial court's factual findings. (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 227-228.)

Viewing the court's January 9, 2006, order by these standards, Ganz failed to show the court abused its discretion in awarding sanctions on the matters heard and submitted on November 30, 2005, when Ganz was still representing plaintiff. We hold, however, that the court erred in imposing sanctions upon Ganz for the matters submitted on January 6, 2006, because Ganz was no longer acting as counsel and had no prior notice or an opportunity to be heard regarding those sanctions.

1. The Trial Court Properly Awarded Sanctions Against Ganz on the Matters Submitted on November 30, 2005

In the matters submitted on November 30, 2005, MTA sought discovery regarding plaintiff's claimed injuries and damages, including her medical leaves from prior employment during the last 10 years.

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5 Soon after issuing its discovery order, the court granted MTA a summary judgment against plaintiff on the merits, from which judgment plaintiff did not appeal.

In May 2005, plaintiff provided verified responses to interrogatories that stated as a result of MTA's conduct plaintiff suffered from: "Major [d]epression; stress, strain and anxiety; agitation; obsessive/compulsive fear, suicidal ideation; ongoing humiliation and shame; diminished interest and pleasure in daily activities; sleeplessness resulting in fatigue and loss of energy; loss of self-esteem; emotional withdrawal that has made her reluctant to socialize with her friends; mistrust toward others and feelings of betrayal . . . [;] increased irritability; insecurity and fears about the future; crying spells; nightmares and flashbacks about her ordeal; headaches; stomach aches; rapid heartbeats; and stress-related increased appetite that has made her seek temporary comfort in food and overeat, thus causing her considerable weight gain." Plaintiff further claimed that, "[d]ue to Defendants' retaliatory harassment, she was forced to take a medical leave twice which, in turn has caused her lost wages. In addition, she has incurred and will continue to incur considerable medical costs, including for psychological counseling, doctors' visits and medications, for her ongoing emotional distress and related physical ailments."

In context of this response, MTA propounded special interrogatories inquiring whether plaintiff had taken any medical leaves from prior employers during the last 10 years and the reasons for such leaves. Ganz objected to the discovery on the ground that former section 2017, subdivision (d), the precursor of present section 2017.220, prohibited disclosure because of plaintiff's right of medical and sexual privacy. Ganz also objected to the discovery on grounds including irrelevancy, vagueness, ambiguity and uncertainty.

MTA attempted to resolve the matter by meeting and conferring with Ganz without success. MTA therefore brought a motion to compel further responses to its special interrogatories. Because of Ganz's sexual privacy objections, MTA also concurrently filed a motion under section 2017.220 asking the court to allow inquiry into plaintiff's medical history given indications of her past severe mental illness and her Parkinson's disease, as well as her history of prior medical leaves. The interrogatories and request for discovery did not inquire into plaintiff's sexual history. MTA established to the court's satisfaction that plaintiff had a history of medical leaves from other employers for undisclosed medical conditions and also had suffered from the same emotional injuries prior to her employment with MTA that she claimed to have suffered as a result of MTA's conduct.[6] The requested information was directly relevant to whether plaintiff's medical condition and loss of earnings were in fact caused by MTA's conduct or whether they were attributable to some other cause, such as a preexisting physical or mental illness. The discovery was highly probative given that plaintiff alleged she stopped working in March 2004 for injuries supposedly caused by her MTA employment. Because the information related directly to the injuries and damages plaintiff claimed to have suffered, disclosure was essential to MTA's defense and the fair resolution of the lawsuit. (See *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 842 ["plaintiff cannot be allowed to make her very serious allegations without affording defendants an opportunity to put their truth to the test"]; *Britt v. Superior Court* (1978) 20 Cal.3d 844, 864, fn. 9 ["insofar as . . . injuries or illnesses . . . have contributed to a medical condition placed in issue by a plaintiff, defendant is entitled to obtain information as to all such injuries or illnesses"].) On the other hand, the record is devoid of any factual evidence or declarations from plaintiff's healthcare providers corroborating

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6 For example, a July 2005 National Labor Relations Board opinion in a labor matter indicated plaintiff had suffered from an illness that caused her to quit her job with a prior employer. An April 2002 job application plaintiff submitted to another employer stated she left a prior job because of a medical leave. Plaintiff told her treating doctor she had a "complete mental breakdown" (boldface omitted) from March 2001 to March 2003. Plaintiff's psychiatrist testified that in March 2003, prior to plaintiff's MTA employment, plaintiff was hospitalized for four weeks in a mental institution because she wanted to kill herself. The psychiatrist testified he had diagnosed plaintiff with Bipolar disorder in April 2005 and had prescribed medication for that condition which turned out to be the same medication plaintiff was claiming she was taking as a result of MTA's conduct. One of plaintiff's redacted medical records, dated shortly after the alleged incidents, stated that plaintiff's depression had "c[o]me back" and she had "thoughts of wanting *to return to* the hospital." (Italics added, boldface omitted.) When plaintiff disclosed her Parkinson's disease at deposition, she also admitted the condition had prevented her from working as a bus operator for a prior employer.

her claim that discovery of the requested information would result in a disclosure of her prior sexual conduct with individuals other than the alleged perpetrator or her sexual history. The trial court also limited the scope of discovery to the preceding five years, balancing plaintiff's privacy interests with MTA's need for discovery. The trial court therefore did not abuse its discretion in ordering the discovery.

The Civil Discovery Act provides for monetary sanctions when a party or attorney unsuccessfully opposes a motion to compel discovery.[7] In this case, Ganz received appropriate notice that sanctions were being sought against it on the motions heard on November 30, 2005, and had a reasonable opportunity to oppose the award of sanctions. The trial court also found monetary sanctions to be justified by Ganz's conduct. At the hearing on November 30, 2005, the court told Ganz: "you rolled the dice, you said [MTA] can't have *any* information about medical leaves, and you lost. You stonewalled, you gave no information[] *at all*." (Italics added.) The court found in particular that

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7 Section 2030.300, subdivision (d) provides that "[t]he court shall impose a monetary sanction . . . against any party, person, *or attorney* who unsuccessfully makes or opposes a motion to compel a further response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Italics added.)

Section 2017.220, subdivision (b) provides that "[t]he court shall impose a monetary sanction . . . against any party, person, *or attorney* who unsuccessfully makes or opposes a motion for discovery under subdivision (a), unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Italics added.)

Section 2023.030, subdivision (a) provides that "[t]he court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, *or any attorney advising that conduct*, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. The court may also impose this sanction on one unsuccessfully asserting that another has engaged in the misuse of the discovery process, *or on any attorney who advised that assertion*, or on both. *If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction* unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Italics added.)

MTA had shown plaintiff had a history of "working for very short periods of time with employers and medical leaves" and was entitled to the requested information. The record supports an inference that Ganz used the section 2017.220 objection to forestall legitimate inquiry into plaintiff's Parkinson's disease, mental hospitalization for suicidal ideation and two-year mental breakdown. Before this court, Ganz has not shown the trial court's rulings on the matters submitted on November 30, 2005, exceeded the bounds of reason. (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545 [discovery sanctions reversible only for arbitrary, capricious or whimsical action]; see also *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 432 [complaining party must show how and why the court's action constitutes an abuse of discretion].)

Ganz protests that the trial court did not specifically find that MTA showed a compelling need for the discovery or that MTA's need outweighed plaintiff's privacy rights. Nor, Ganz argues, did the court explicitly find that Ganz lacked substantial justification for its actions. The discovery statutes, however, do not require the court to recite in detail the circumstances justifying a sanctions award. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 261.) In fact, the trial court is not required to make findings at all when the court awards discovery sanctions. (*Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1603.) It is true that an award of monetary sanctions against a party's attorney requires a finding under section 2023.030, subdivision (a) that the " 'attorney advis[ed] that conduct.' " (*Ghanooni, supra,* at p. 261.) Such a finding is implicit when a court imposes discovery sanctions against an attorney.

Moreover, the burden is on the attorney to prove the attorney had *not* advised the client to engage in the conduct resulting in sanctions. (*Corns v. Miller* (1986) 181 Cal.App.3d 195, 200-201.) Just the opposite can be inferred from Ganz's declarations, which recited that Ganz "redact[ed] . . . those matters which Defendants have no right to see" and "sent a letter . . . to defense counsel explaining why the interrogatories were improper and further explaining why Plaintiff's rights to privacy were improperly invaded by the interrogatories." It is clear Ganz counseled its client to withhold such discovery. Indeed, the record reflects that plaintiff signed authorizations for disclosure of some of her medical records, but Ganz redacted them before producing them to MTA.

Since Ganz has not shown the trial court abused its discretion in ruling on the matters submitted on November 30, 2005, the court's discovery orders as to such motions are affirmed. The same cannot be said, however, for the $2,500 in sanctions awarded with respect to the motions submitted on January 6, 2006, because we find the court abused its discretion in imposing such sanctions upon Ganz.

2. The Trial Court Did Not Properly Impose Sanctions upon Ganz as to the Motions Submitted on January 6, 2006

The trial court awarded MTA a total of $2,500 in monetary sanctions against plaintiff and Ganz with respect to plaintiff's motion to quash deposition subpoenas and for a protective order, motion to compel a further answer to plaintiff's special interrogatory and motion to compel further responses to plaintiff's request for production submitted on January 6, 2006. Ganz raises a number of objections to these sanctions. We need not address most of the objections because we are persuaded Ganz did not have proper notice of the requests for sanctions.

MTA served and filed its oppositions to plaintiff's motions and requests for sanctions on December 22, 2005, 17 days after Ganz had substituted out of the case. The opposition papers were mailed to plaintiff as a party in propria persona but were not served on Ganz. The record does not show that Ganz was aware of MTA's sanctions requests, nor did Ganz file any opposition to the sanctions requests or appear at the hearing on January 6, 2006. Ganz therefore did not have an opportunity to be heard on the issue of those sanctions.

Section 2023.030 authorizes the trial court to impose discovery sanctions only "after notice to any affected . . . attorney," and "after opportunity for hearing." Section 2023.040 provides that "[a] request for a sanction shall, in the notice of motion, identify every . . . attorney against whom the sanction is sought, and specify the type of sanction sought." When discovery sanctions are sought in opposition to a motion, the notice should logically be given in the opposition to the motion. The requirement that the motion or opposition “identify” any attorney “against whom the sanction is sought” and “specify the type of sanction sought” would be superfluous if the motion or opposition is not also required to be served on an affected attorney. Under the discovery statutes, an affected attorney must be given appropriate notice of the fact that sanctions are being sought against the attorney and the nature of the sanctions being sought so the attorney can appear and defend against the requested sanctions. Existing case authority also “ ‘clearly contemplates an evidentiary hearing in the trial court on the question of whether the attorney is deserving of blame in connection with his client’s failure to comply with discovery.’ ” (*In re Marriage of Fuller* (1985) 163 Cal.App.3d 1070, 1078, quoting *Blumenthal v. Superior Court* (1980) 103 Cal.App.3d 317, 320.) Prior notice of the imposition of sanctions is also mandated by the due process clauses of both state and federal Constitutions. (*Fuller*, *supra*, at p. 1077; Cal. Const., art. I, § 7; U.S. Const., 14th Amend.) This is because “[t]he most basic principles of due process preclude the taking of . . . property without notice of an intention to do so. [Citations.]” (*Blumenthal*, *supra*, at p. 320.)

Since Ganz did not receive appropriate notice, the court’s sanctions award of $2,500 against Ganz with respect to the matters submitted on January 6, 2006, cannot stand and is therefore reversed.[8]

DISPOSITION

The order of January 9, 2006, is reversed insofar as it awards monetary sanctions against Ganz with respect to plaintiff’s motion to quash deposition subpoenas and for a protective order, motion to compel a further answer to plaintiff’s special interrogatory

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8 MTA argues Ganz was not prejudiced by the lack of notice of the sanctions requests, because Ganz had an opportunity to argue regarding the substantive merits of the discovery dispute at the earlier hearing. The argument misses the point. When a person has received no notice of requested sanctions, the resulting order is void. (*Lovato v. Santa Fe Internat. Corp.* (1984) 151 Cal.App.3d 549, 553.) The lack of notice itself is prejudicial.

and motion to compel further responses to plaintiff's request for production. The court's order is otherwise affirmed. The parties are to bear their own costs on appeal.

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FLIER, J.

We concur:

COOPER, P. J.

RUBIN, J.